IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 3

FRANCISCO ROMERO,

Petitioner,

against

INTERNATIONAL TERMINAL OPERATING CO., COMPANIA TRASATLANTICA, also known as SPANISH LINE and GARCIA & DIAZ, INC. and QUIN LUMBER CO., INC.,

Respondents.

PETITIONER'S BRIEF ON THE MERITS

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In The

Supreme Court of the United States

OCTOBER TERM, 1957

No. 322

Francisco Romero,

Petitioner,

against

International Terminal Operating Co., Compania Trasatlantica, also known as Spanish Line and Garcia & Diaz, Inc. and Quin Lumber Co., Inc.,

Respondents.

PETITIONER'S BRIEF ON THE MERITS

The Opinions of the Courts Below

The opinion of the United States District Court, Southern District of New York (R. 247-253a; Sugarman, D. J.) printed in the Appendix to the Petition, page 40 is reported in 142 F. Supp. 570 and 1956 A. M. C. 1579.

The per curiam opinion of the Court of Appeals for the Second Circuit (Hincks, Lumbard and Waterman, JJ.), printed in the Appendix to the Petition, page 47 is reported in 244 F. 2d 409 and 1957 A. M. C. 1230.

Jurisdiction

The decision and judgment of the United States Court of Appeals being reviewed was entered April 30, 1957. The petition for certiorari was docketed July 29, 1957

and was granted on October 14, 1957. The jurisdiction of this Court is under 28 U. S. C. Secs. 1254(1) and 2101(c).

Jurisdiction of this court was invoked to review important questions arising under the jurisdictional provisions of the Judicial Code, 28 U. S. C. A. Sec. 1331-1333, the general maritime law of the United States, the provisions of Section 33 of the Jones Act (46 U. S. C. 688) and of the Federal Employers Liability Act (45 U. S. C. Sec. 51-55) incorporated thereby, Article III, Sec. 2, Article VI, cl. 2 of the United States Constitution, and the treaty between the United States and Spain, and to review and settle conflicts in decisions.

This Court has not yet decided petitioner's application for an order dispensing with the printing of the record.

Constitutional and Statutory Provisions Involved

The provisions involved of the United States Constitution (Art. III, Sec. 2, and Art. VI, cl. 2) and statutes (Judicial Code 28 U. S. C. Secs. 1331, 1332, 1333, 1652; Jones Act of June 5, 1920, ch. 250, Sec. 33, 41 Stat. 1007, 46 U. S. C. Sec. 688; Federal Employers Liability Act of April 22, 1908, ch. 149, Secs. 1, 5, 35 Stat. 66, 45 U. S. C. Secs. 51, 55, and Art. VI and abrogated Art. XXIII of the treaty of 1902 between the United States and Spain (Treaty Series No. 422 re-printed by the Government Printing Office in February, 1954) are printed in the appendix hereto, pages 62-63.

Questions Presented

1. Whether under 28 U. S. C. Sec. 1331 the district court has and should exercise jurisdiction (a) of plaintiff's claims under the general maritime law of the United

States and (b) of plaintiff's claims under Section 33 of the Jones Act (46 U. S. C. Sec. 688).

2. Whether (a) the general maritime law of the United States and (b) the provisions of Section 33 of the Jones Act (46 U. S. C. Sec. 688) apply to the tort where a foreign seaman employed on a foreign ship suffers injuries, due to unseaworthiness of the vessel and negligence of its owner, its American agent and American stevedores and carpenters, while the ship is tied up at a pier in the port of Hoboken, New Jersey, for unloading and reloading, and the plaintiff is treated for his injuries for eight months in St. Mary's Hospital, Hoboken, New Jersey.

3. Whether such questions are questions of merits, to be tried and determined only in *exercise* of a fastened jurisdiction, and cannot, on motion to dismiss for "lack of jurisdiction of the subject matter", be changed from questions of merits into a question of jurisdiction and be tried and determined on such motion as a question of jurisdiction; and

Whether on such motion the District Court lacked authority to hear and determine the merits of a defense based on an alleged prior Spanish contract and the laws of Spain as allegedly affording plaintiff a sole remedy against his employer.

4. Whether the treaty with Spain and its partial abrogation pursuant to the mandate of the Seaman's Act of 1915, prior to enactment of Section 33 of the Jones Act as an amendment of said Seaman's Act, prevents or permits the Court to exercise jurisdiction in a case such as this.

5. Whether the election given by Section 33 of the Jones Act (46 U. S. C. Sec. 688) to "Any seaman" to maintain an action for damages at law with a right of trial by jury, and its incorporating the provisions of Sec-

tion 5 of the Federal Employers Liability Act (45 U. S. C. Sec. 55) that "Any contract, rule, regulation or device whatsoever" to exempt a carrier from liability under the statute shall to that extent be void, preclude holding that the jurisdiction of the district court can be defeated by a prior contract to have claims for injuries sustained by the seaman controlled by the law of Spain.

6. Whether evidence offered by defendants, on their motions to dismiss for "lack of jurisdiction of the subject matter," either to refute allegations of the complaint as to ownership, management, operation or control of the vessel, or to establish alleged defenses of foreign law and prior agreement between plaintiff and the foreign shipowner to have claims for injuries sustained while in the employ of such defendant controlled by the law of Spain, should have been excluded on plaintiff's objection and should have been stricken out on plaintiff's motion to strike the same; and whether the Court's findings based thereon should be reversed and stricken out.

7. Whether the district court, having jurisdiction of plaintiff's claims under Section 33 of the Jones Act (46 U. S. C. Sec. 688) and for unpaid wages, has and should exercise pendent jurisdiction of plaintiff's claims under the general maritime law of the United States against the same defendant, even if jurisdiction of such maritime law claims were otherwise lacking under 28 U. S. C. Sec. 1331.

8. Whether the district court has and should exercise jurisdiction under 28 U. S. C. Sec. 1332 of plaintiff's claims against the three American defendants by reason of diversity.

9. Whether the district court, if it lacked jurisdiction at law, has and should exercise jurisdiction in admiralty.

10. Whether it was error to dismiss for lack of jurisdiction of the subject matter the action of this disabled foreign seaman plaintiff (a) against the owner and operators of the foreign vessel for damages, maintenance and cure and unpaid wages, under the general maritime law of the United States and all statutes amendatory thereof, including specifically Sec. 33 of the Jones Act, and (b) against American third-party defendants for damages under the general maritime law of the United States.

Statement of the Case

Petitioner, a Spanish seaman and member of the crew of the Spanish S. S. Guadalupe was tragically injured on board the vessel while it was tied up at Pier No. 2, Hoboken, New Jersey on May 12, 1954 (R. 198a, par. Eighth; R. 202a par. Twenty-first), to unload passengers's baggage and take on cargo, and lumber for erecting shifting boards for grain cargo.

Petitioner's left leg was severed and his right leg broken with multiple fractures, in addition to other bodily injuries (R. 199a; R. 245a, par. 89). At point of death he was placed in St. Mary's Hospital, Hoboken, New Jersey, where he underwent treatment from May 12, 1954 until January 11, 1955 (R. 107a), a period of eight months.

No compensatory damages, compensation, maintenance and cure nor wages have been paid to petitioner or the hospital since the injury. The hospital bill of St. Mary's Hospital for $3,750.60 (alleged as about $4,000, R. 249a, par. 93) remains unpaid, and a lien therefor was filed by the hospital against any recovery petitioner may secure in this action (R. 109a-110a). Other bills of Americans including one for $195 for an artificial limb for petitioner and one for $25 for burial of the amputated part of his leg also remain unpaid (R. 245a, par. 94; R. 116a-117a).

Petitioner as plaintiff instituted an action at law against the Spanish corporate owner, Compania Trasatlantica, also known as Spanish Line (Compania) and three American corporations, Garcia & Diaz, Inc. (Garcia), Internation Terminal Operating Co. (International), and Quin Lumber Co., Inc. (Quin). A jury trial was demanded.

The amended complaint alleged that Compania and Garcia each owned, operated, controlled and managed the vessel, and that plaintiff was employed by each of said defendants (R. 198a, pars. Fifth-Seventh). International had with Garcia a stevedoring contract to unload (R. 201a, par. Eighteenth; R. 204a, par. Twenty-ninth) and Quin a carpentering contract to make shifting boards for a grain cargo (R. 203a, par. Twenty-sixth).

The amended complaint in four causes of action sought damages against the defendants Compania and Garcia under Section 33 of the Jones Act for negligence and under the general maritime law of the United States for unseaworthiness of the vessel (first cause, R. 197a-200a), for maintenance and cure and unpaid wages (second cause R. 200a-201a), and against all four defendants for damages under the general maritime law of the United States (first, third and fourth causes, R. 197a-200a; 201a-206a).

The allegations showing unseaworthiness and negligence include the following:

(a) The wire cable on the boom winch was unseaworthy in that it was twisted and old, and unsuitable for the task assigned (R. 199a, R. 238a, pars. 10, 12, 14; R. 240a, pars. 20, 21, 23; R. 241a, par. 30; R. 242a, par. 54; R. 244a, pars. 73, 83).

(b) The bosun of the S.S. Guadalupe negligently rushed Romero, and other members of the crew in the operation of lowering a boom prior to taking on the lumber (R. 202a, par. Twenty-first).

(c) The said bosun negligently ordered an insufficient number of crew members to perform the operation in which Romero was hurt; and negligently ordered Romero's assistants away and permitted the winch to be started while he was shorthanded and there was nobody to supervise the work (R. 204a, par. Twenty-ninth; R. 238a-239a, pars. 10, 12, 15, 19).

(d) The bosun was negligently called away from and negligently left the place where Romero was working, without providing proper supervision of the man operating the winch and a man to help Romero handle the metal lines (R. 205a, R. 239a, par. 18a).

(e) Garcia, International and Quin Lumber Co. were negligent in causing the bosun to leave his post of supervising the topping of the boom (R. 205a, R. 243a, par. 68, R. 244a, par. 78).

(f) The stevedore and land carpenter employees of Garcia, International and Quin rushed the bosun and the crew members to have the boom lowered even with insufficient crew members on the operation (R. 202a, par. Twenty-first).

(g) The land carpenters and stevedores, employees of Quin and International, twisted the boom winch wire by negligently throwing or kicking aside on the deck the wire previously laid out orderly by Romero (R. 204a-205a, R. 240a, par. 21).

(h) A carpenter or stevedore, in his attempt to aid Romero, tried to straighten out the twisted wire which Romero was feeding to the winch, but negligently failed to straighten or warn of a dangerous snarl in the wire which caused it to lose contact with the niggerhead (R. 239a, par. 18a).

(i) The menacing atmosphere created by the stevedores and carpenters toward the foreign crew members, including Romero, because they were doing an

operation usually done by said stevedores and carpenters for additional pay, made the whole operation additionally dangerous (R. 204a-205a, par. Twenty-ninth; R. 239a, par. 19; R. 204a, par. 22(a), 23(c), pars. 55, 56).

Jurisdiction was alleged of the claims against Compania and Garcia as an action brought under the general maritime law of the United States and all statutes amendatory thereof including Section 33 of the Jones Act (R. 200a).

Jurisdiction was alleged of the claims against International and Quin as an action cognizable under the Constitution of the United States and the general maritime law of the United States (R. 202a, 204a).

Jurisdiction as to these defendants was also predicated on diversity of citizenship (R. 202a), and diversity also exists as to Garcia.

The four answers of all defendants (R. 207a, 211a, 216a, 220a) put in issue substantially all of the allegations of each of the four causes of action; the answers of Compania and Garcia pleaded as a defense a lack of jurisdiction of the subject matter (R. 214a, 219a); and the answer of Compania also pleaded as a defense that plaintiff's sole rights were governed by an alleged Spanish contract and the laws of Spain and that plaintiff cannot maintain suit against it under the Jones Act or the general maritime law of the United States and that plaintiff's sole remedy must be asserted in Spain or before a representative of the Spanish government (R. 214a-215a).

Contested discovery proceedings were had preparatory for trial (*Romero* v. *International, etc.*, 1955 A. M. C. 1814).

Several months before plaintiff's recovery and discharge from the hospital, on a representation that a com-

pany doctor had examined plaintiff and said that he "could travel", counsel for Garcia & Diaz and Compania "sent a letter to Immigration" and told Garcia & Diaz "to tell Immigration immediately to send him back" (R. 90a-91a).

Motion, Pretrial and Decisions Below

When the action was called and assigned for trial a motion was made by defendants before the District Judge to whom the case had been assigned for trial to dismiss the complaint for "lack of jurisdiction of the subject matter."

The district judge to whom the case had been assigned for trial thereupon conducted instead a pre-trial hearing on this motion and repeatedly asserted that it was confined to such motion (R. 97a, 117a, 194a). In the conclusion of the hearing the court stated:

> "The Court: • • • However, so there will be no misunderstanding, I am proceeding on the basis that each of the four defendants has moved orally, which brought on this pretrial hearing, for a dismissal of the complaint upon the ground of *lack of jurisdiction of the subject matter.*
>
> Mr. Quinlan: *That is right.*
>
> The Court: *And those are the motions I am going to decide"* (R. 194). (Italics ours.)

Over petitioner's objections (R. 8a, 19a-22a, 87a, 97a-103a, 176a) and subject to motion by petitioner to strike out the evidence (R. 104a-106a, 173a, 176a-177a), the Court, nevertheless, received evidence relating to the relationship between Compania and Garcia or its partnership predecessor all commencing in 1935 and with reference to the management, operation and control of the vessel, and evidence under the fourth defense of Compania based on allegations of Spanish contract and Spanish law.

Over objection and motion to strike the court received in evidence a contract signed by Romero for a previous round trip voyage notwithstanding that it was limited by its terms to that previous voyage, and that no contract was signed for the voyage on which the accident occurred (R. 15a).

Over objection and motion to strike the court heard the testimony of a foreign law expert for the defendant steamship company, and (without prejudice to petitioner's objections and motion to strike) a contrary opinion of a foreign law expert for the plaintiff, respecting the effect of the said contract and Spanish law, and made a finding that under the law of Spain, when the seaman remained in the employ of the ship during subsequent voyages the subsequent service was under the terms and conditions of the original written contract, a finding that an injured Spanish Seaman has an exclusive Workmen's Compensation remedy under Spanish law, and a finding that Garcia was solely an agent for husbanding the vessel.

It was "On the basis of the foregoing" facts first found in its opinion that the court did then "*turn now* to the question of jurisdiction in this court to entertain the action" (R. 251a, Appendix to Petition, p. 44). It held that "The possible bases of jurisdiction are four: (1) the Jones Act (2) a Federal question; (3) diversity; (4) discretionary, under the general maritime law; the first three on the law side with a trial by jury, the fourth in admiralty with a trial to the court" (R. 251a; Appendix to Petition, p. 44).

It ignored the question of (5) jurisdiction of the claim for unpaid wages, and (6) the question of pendent jurisdiction.

As to Jones Act jurisdiction, citing *The Paula*, 2d Cir. 1937, 91 F. 2d 1001; *Paduano* v. *Yamashita*, 2d Cir. 1955, 221 F. 2d 615 and *Gambera* v. *Bergoty*, 2d Cir. 1942, 132

F. 2d, 414, cert. den. 319 U. S. 742, and ignoring this Court's decision in *Lauritzen* v. *Larsen*, 1953, 345 U. S. 571, the district court held that "It is settled *in this circuit*" than an alien seaman *cannot sue* under the Jones Act for injury suffered while the ship is in an American port and that "Accordingly, the plaintiff's action against the defendant Compania under the Jones Act must be dismissed." As respects Garcia, the Court, citing *Cosmopolitan Shipping Co.* v. *McAllister*, 1949, 337 U. S. 783, 790, held that "plaintiff's Jones Act claim against this defendant must also be dismissed" in light of the Court's finding that the defendant Garcia was solely an agent for husbanding the vessel. Notwithstanding that the pre-trial hearing was asserted to be on the question of jurisdiction only, the district court stated, in its opinion that:

> "There was *no proof adduced at the pretrial hearing* of management, operation and control by Garcia except as it might arise by virtue of the agency agreement. *Nor did plaintiff offer any proof of any negligent act* by defendant Garcia within the scope of the agency, contributing to his injury." (Italics ours.)

It thus treated the *jurisdiction* motion and hearing as though it were a trial of the merits, but without affording plaintiff an opportunity to try the merits.

As respects "Jurisdiction because of a federal question" the district court, citing *Paduano* v. *Yamashita*, *supra*, and *Troupe* v. *Chicago, Duluth & Georgian Bay Transit Co.*, 2d Cir. 1956, 234 F. 2d, 253, held that "It is similarly established *in this circuit* that the facts herein present no federal question."

As respects jurisdiction because of diversity the district court, citing a Southern District court decision in *Tsitsinakis* v. *Simpson, Spence and Young*, S. D. N. Y., 90 F. Supp. 578, held that necessary diversity is lacking because plaintiff and defendant Compania are both subjects of Spain.

As respects discretionary jurisdiction in admiralty—which plaintiff did not plead—the court, citing a Southern District court decision, *Nakken* v. *Fernley and Egger*, S. D. N. Y., 137 F. Supp. 288, held that in light of its findings as to Spanish law the court would decline jurisdiction in admiralty even as a matter of discretion and that "the defendants' motions are granted and the complaint herein is dismissed."

On appeal by plaintiff, the Court of Appeals for the Second Circuit affirmed on the opinion of the District Court.

Notwithstanding that the amended complaint in the second cause of action pleaded a failure by defendants "to pay him wages to the end of the voyage" (R. 201a), and that this was argued in both courts, neither the District Court nor the Court of Appeals mentioned this in dismissing the complaint for lack of jurisdiction. Petitioner had cited in both courts this Court's decision in *Strathern S. S. Co.* v. *Dillon*, 1920, 252 U. S. 348, holding that our wage statutes are specifically applicable to seamen on foreign vessels while in harbors of the United States, and that by statute the courts of the United States are open to such seamen for their enforcement.

Both the District Court and the Court of Appeals also failed to consider the question of pendent jurisdiction, fully argued by petitioner in both courts.

Confusion in the Second Circuit Between Points Decided and Undecided by This Court; Between Merits and Jurisdiction; Between Tort and Contract Law Locus; Between Grant by Congress of a Cause of Action and Grant of a Right to Sue; and Between Foreign and American Seamen as Respects Grant of the Right to Sue.

This Court has never decided but has noted and reserved for decision the two great questions:

(1) whether the District Court under 28 U. S. C. Section 1331 has jurisdiction of an action based on the general maritime law of the United States as one which "arises under the Constitution, laws, or treaties of the United States" (see *Pope & Talbot* v. *Hawn*, 1953, 346 U. S. 406, 410, footnote 4; and see "I", *infra*, pp. 20, 23); and

(2) whether Section 33 of the Jones Act is applicable when an alien seaman is injured on a foreign vessel in an American port (see *Plamals* v. *Pinar del Rio*, 1928, 277 U. S. 151, 155; *Uravic* v. *Jarka*, 1931, 282 U. S. 234; *Lauritzen* v. *Larsen*, 1953, 345 U. S. 571; and see "III", *infra*, pp. 40, 41).

During the pre-trial hearing herein the District Court stated, with reference to both these questions that *"until the Supreme Court finally speaks we are never going to know . . . I only wish that the day would come. This may be the agency for getting the Supreme Court to speak once and for all"* (R. 99a). See also: *Paduano* v. *Yamashita Kisen Kabushiki Kaisha*, 2d Cir. 1955, 221 F. 2d 615, 617.

In contrast with the two foregoing questions reserved and undecided by this Court,

(3) This Court consistently has sustained jurisdiction of actions at law under Section 33 of the Jones Act (*Panama R. R. Co.* v. *Johnson*, 1924, 264 U. S. 375, 383-384; *Lauritzen* v. *Larsen*, 1953, 345 U. S. 571, 574 and 575).

(4) This Court and the First and Third Circuits also have sustained and applied the principle of pendent jurisdiction (*Hurn* v. *Oursler*, 1933, 289 U. S. 238; *Doucette* v. *Vincent*, 1st Cir. 1952, 194 F. 2d, 834, 840; *Nolan* v. *General Seafoods Corp.*, 1 Cir., 1940, 112 F. 2d 515, 517, and *Lindquist* v. *Dilkes*, 3 Cir., 1942, 127 F. 2d 21.

(5) This Court also throughout its history has repeatedly distinguished between jurisdiction and merits, holding that

merits, whether of plaintiff's claim or of defenses of defendant, may not be determined on motion to dismiss for lack of jurisdiction of the subject matter. (See cases cited in Point "II", *infra*, p. 33.)

(6) This Court in *Strathearn S. S. Co.* v. *Dillon*, 1920, 252 U. S. 354, 37 days before the Senate Report No. 573 proposing the amendment made in Section 33 of the Jones Act, emphasized the difference between grant of a cause of action and grant of a right to sue and that grant of a right to sue—unnecessary and wholly superfluous in the case of American seamen but necessary in the case of foreign seamen—manifests a purpose not to limit a statute to American seamen but to have it apply to seamen on foreign vessels in our ports.

But, for lack of a decision by this Court clarifying the applicability of Section 33 of the Jones Act to alien seamen injured on foreign vessels in American ports and treated at great expense to American hospitals, much confusion has been evinced in the lower courts, particularly in the Second Circuit, both (a) in failing to distinguish between the question of merits determinable by trial of the injured seaman's suit, and the question of jurisdiction of the subject matter determinable from reading plaintiff's complaint upon a motion to dismiss for lack of jurisdiction thereof; and (b) in failing to apply both in determining jurisdiction and in the trial and determination of such actions a proper and consistent *tort* theory and a proper construction of the first clause granting a right to sue, unnecessary and superfluous as to American seamen.

The confusion in the Second Circuit in these respects stems from its decision in *The Paula*, 2 Cir. 1937, 91 F. 2d 1001; and is manifest in its later decisions in *Gambera* v. *Bergoty*, 2 Cir. 1942, 132 F. 2d, 414, cer. den. 319 U. S. 742; *Kyriakos* v. *Goulandris*, 2 Cir. 1945, 151 F. 2d 232; *Taylor* v. *Atlantic Maritime Co.*, 2 Cir. 1950, 179 F. 2d

597, cer. den. 341 U. S. 915; *Larsen* v. *Lauritzen*, 2 Cir. 1952, 196 F. 2d 220, reversed *Lauritzen* v. *Larsen*, 345 U. S. 571; *Paduano* v. *Yamashita Kisen Kabushiki Kaisha*, 2 Cir. 1955, 221 F. 2d 615; *Troupe* v. *Chicago, Duluth & Georgian Bay Transit Co.*, 2 Cir. 1956, 234 F. 2d 253; *McAfoos & Neff* v. *Canadian Pacific Steamship Ltd.*, 2 Cir. 1957, 243 F. 2d 270, and the case at bar. The *Paula*, *Gambera* and *Kyriakos* decisions were in admiralty and in *The Paula* the court erroneously undertook to decide the question of merits on a jurisdictional motion, upon which it declined to take jurisdiction and dismissed the libel on a holding that the Jones Act did not give right of recovery to a German who was a seaman on board a Danish vessel under articles signed in a Chilean port, and who was injured while the vessel was in the port of Jacksonville, Florida.

In *Gambera* v. *Bergoty* the court reversed a dismissal of a libel by an Italian subject who was a seaman on a Greek vessel and was injured in American coastal waters during a voyage from one United States port to another.

In *Kyriakos* the court sustained recovery by a Greek seaman who signed on a Greek vessel in an American port and injured in the American port of Fernaneina, holding the Jones Act applicable and distinguishing *The Paula* decision where the seaman had signed on abroad.

The *Taylor, Larsen, Paduano, Troupe* and *McAfoos* cases were actions at law.

In *Taylor* the court reversed the dismissal, but applied the place of contract theory. In *Taylor* the seaman, a citizen of Panama serving on a Panamanian ship, had signed on in an American port; in his suit for failure to treat after he contracted tuberculosis the court followed *The Paula* and *Gambera* decisions, holding respecting *The Paula* that "The varient at bar is that the seaman signed articles in the United States."

In *Larsen* v. *Lauritzen* the same court affirmed a recovery by a Danish seaman on a Danish ship for injury sustained in Cuban waters, citing the *Kyriakos* and *Taylor* decisions to support the recovery because the man signed on in an American port.

This Court in *Lauritzen* v. *Larsen*, 1953, 345 U. S. 571, completely rejected "the place of contract" factor adopted by the Second Circuit, saying:

"But a Jones Act suit is for *tort*" (345 U. S. 588).

This Court also similarly rejected the Second Circuit's theory that *jurisdiction* depends on whether the injured seaman has an enforceable right under the Jones Act. It sustained jurisdiction notwithstanding that it reversed recovery after trial and dismissed the complaint on the merits.

The *McAfoos* case shows continued confusion as to the "election" and "may maintain" clause (243 F. 2d 272-274). Cf. Point III, *infra*, pages 40 *et seq.*

Summary of Argument

Until the Act of March 3, 1875, 18 Stat. c. 137, page 470, was enacted, the lower Federal courts had no original jurisdiction of any case arising under the Constitution, laws or treaties of the United States; and original jurisdiction in such cases was limited either to state courts or to diversity cases in Federal court.

That act, however, was intended to and did confer on the Circuit Court original jurisdiction in all cases of which the Supreme Court would have jurisdiction under the Constitution as cases arising under the Constitution, laws or treaties of the United States. Similarly, 28 U. S. C. A. Sec. 1331 now confers original jurisdiction on the United States District Court.

This includes not only actions based on Federal statutes, including the Jones Act (*Panama R. R. Co.* v. *Johnson*, 1924, 264 U. S. 375, 383-384; *Lauritzen* v. *Larsen*, 1953,

345 U. S. 571, 574-575), but actions based on the general maritime law of the United States (*Jansson* v. *Swedish American Line*, 1 Cir. 1950, 185 F. 2d 212; *Doucette* v. *Vincent*, 1 Cir. 1952, 194 F. 2d 834) of which the Supreme Court would have appellate jurisdiction whether from a state court (*Garrett* v. *Moore McCormack*, 1942, 317 U. S. 239) or from the law side of the United States District Court (*Pope & Talbot Inc.* v. *Hawn*, 1953, 346 U. S. 406; *Seas Shipping Co.* v. *Sieracki*, 1946, 328 U. S. 85, 88). See also for comparable interpretation of "laws" *Erie R. R. Co.* v. *Tompkins*, 1938, 304 U. S. 64, and *Warren* v. *U. S.*, 1951, 340 U. S. 523.

There was, therefore, jurisdiction of all claims pleaded by plaintiff, and the motion to dismiss for lack of jurisdiction of the subject matter should have been summarily denied.

There is a fundamental distinction between the question of jurisdiction and the question of merits; and the district court here erred in receiving evidence and in making findings and determinations of merits on the motion to dismiss for lack of jurisdiction of the subject matter. Such evidence should have been excluded on plaintiff's objections and should have been stricken out on plaintiff's motion to strike the same and the findings based thereon should be set aside.

Under Section 33 of the Jones Act moreover, a case such as this, where a foreign seaman was gravely injured on a foreign ship in an American port and treated at length in an American hospital, which remains unpaid, must be fully tried before a jury; and that statute precludes dismissal as for lack of jurisdiction of the subject matter without full trial of the case.

The provision of the Jones Act that any seaman who shall suffer personal injury in the course of his employment, may, at his election, maintain an action for damages at law with the right of trial by jury was wholly unnecessary and superfluous in the case of American seamen,

but necessary and apt in the case of foreign seamen, and manifests that the statute was intended to apply to injuries such as this to a foreign seaman in an American port who undergoes treatment at great expense to an American hospital. Such provision clearly was inspired by similar reasoning in *Strathearn S. S. Co.* v. *Dillon*, 1920, 352 U. S. 354 with reference to comparable provisions of a wage statute opening the courts of the United States to foreign seamen for enforcement of the act—a provision wholly unnecessary and superfluous in the case of American seamen.

This intent moreover is further shown by other provisions of the Jones Act and by the debate in Congress concerning the same, evidencing that Congress intended the whole act to be for the promotion of the American merchant marine and the equalization to the extent possible of operating costs.

Section 5 of the Federal Employers' Liability Act (45 U. S. C. Sec. 55) makes void any contract, rule, regulation or device whatsoever the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by such statute (*Phila. B. & Wash. R. Co.* v. *Schubert*, 1912, 225 U. S. 603, 613; *Duncan* v. *Thompson*, 1942, 315 U. S. 1-6); and this provision is incorporated by the Jones Act. It therefore, renders void, and makes inadmissible, any foreign contract attempting to preclude enforcement of the Jones Act by limiting the foreign seamen to some remedy abroad.

The contract admitted in evidence, moreover, was not for the voyage in question.

Our treaty with Spain not only fails to preclude assertion by such a Spanish seaman of rights here, but guarantees free access to the courts as well for the prosecution as for the defense of their rights.

As respects both Compania and Garcia, since jurisdiction existed of the action on the claims under the Jones

Act, there was also pendent jurisdiction against them of the claims under the General maritime law, even if such jurisdiction would not otherwise exist under 28 U. S. C. Sec. 1331 and even if the claims under the Jones Act were determined against petitioner on the merits.

The lower courts erred also in ignoring jurisdiction of the wage claim.

And even the holding that there was no diversity jurisdiction is erroneous because diversity existed as to the three American defendants, and the claims against them were not identical with the claims asserted against the Spanish defendant, Compania.

Even if this court should hold as respects any of the defendants that only jurisdiction in admiralty or only diversity jurisdiction is available to petitioner, it was unfair and unjust of the district court at pre-trial hearing, and in advance of the court's determination of the great questions of jurisdiction herein, to require petitioner to elect whether to amend his complaint and proceed upon diversity or in admiralty.

The judgment of the court of appeals and of the district court should be reversed; plaintiff's objections to the evidence offered by defense should be sustained and plaintiff's motion to strike out such evidence and to set aside the findings of the district court based thereon should be granted; and the motions of respondents to dismiss the complaint for lack of jurisdiction of the subject matter should be denied and the case remanded to the district court for trial.

POINT I

Under 28 U. S. C. A. Section 1331 the District Court clearly has jurisdiction (a) of plaintiff's claims under Section 33 of the Jones Act (46 U. S. C. Sec. 688) and (b) of plaintiff's claims under the general maritime law of the United States; and defendants' motions to dismiss for lack of jurisdiction of the subject matter should have been summarily denied.

A

1. It was by the Act of March 3, 1875, 18 Stat. ch. 137, page 470 that Congress first granted to the United States Circuit Court original jurisdiction of cases at law wherein the matter in controversy arises under the Constitution, laws or treaties of the United States, as follows:*

> "That the Circuit Courts of the United States shall have original cognizance, concurrent with the Courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority."

This jurisdictional concept has been retained in the present statute, 28 U. S. C. Sec. 1331, giving district courts original jurisdiction of

> "all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

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* The Sixth Congress in 1801, 2 Stat., c. 4, pages 89-100, in sec. 11, page 92, had granted such jurisdiction to the Circuit Court; but this had been repealed by the Seventh Congress in 1802, 2 Stat., c. 8, page 132, without application thereof in the Courts.

Consequently, *until enactment of the Act of March 3, 1875,* the lower federal courts could exercise jurisdiction in such cases at law only where there was diversity of citizenship; where there was no diversity, such cases at law could be prosecuted only in state courts; and this was true whether the case arose under the Constitution or statutes of the United States or under decisional substantive law of the United States (such as the substantive maritime law), or under treaties of the United States.

2. But under the Constitution the judicial power extended to and this Court had appellate jurisdiction in all such cases whether they arose in State courts or in Federal courts, and whether they involved Federal Statutes or Federal decisional substantive law such as the substantive maritime law.

The United States Constitution in Article III, Sec. 2 (Appendix, *infra,* p. 59) provides that "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority"; and that in all the Cases before mentioned, "the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

Cases such as *Cohens* v. *Virginia,* 1821, 6 Wheat. (19 U. S.) 264, 378; *Osborne* v. *U. S. Bank,* 1824, 9 Wheat. (22 U. S.) 738, 821 and *Garrett* v. *Moore McCormack,* 1942, 317 U. S. 239, 245, 246, show that the Constitution thus extended the Federal judicial power, including this Court's power of review in Federal maritime law cases in State Courts (*Garrett* v. *Moore McCormack, supra*), to all cases involving substantive Federal law.

3. When the Act of 1875 was before Congress (Hart & Wechsler, *The Federal Courts and the Federal System,* p. 75), Senator Carpenter, sponsoring the act, said:

"The *act of 1789* did not confer *the whole power which the Constitution conferred; it* did not do what the Supreme Court has said Congress ought to do, *it* did not perform what the Supreme Court has declared to be the duty of Congress. *This bill does . . . This bill gives precisely the power which the Constitution confers—nothing more, nothing less.*" (Italics ours.)

It is not, therefore, by chance that the language of the Act of March 3, 1875 and of present 28 U. S. C. Sec. 1331, literally covered every case that the Constitution provision covers.

It was *intended* to give, first the Circuit Court and later the District Court, original jurisdiction of every case of which this Court could have appellate jurisdiction as a case arising under the Constitution or laws of the United States, and to make no distinction in respect to jurisdiction of the one Court any more than the other between cases based on Federal Statutes and cases based on Federal Substantive Law such as the maritime law.

B

Since the Act of 1875 was enacted, it has never been doubted that a case arising under a statute of Congress and involving construction thereof is within the jurisdiction of the district court.

In *Panama R. R. Co.* v. *Johnson, supra,* 1924, 264 U. S. 375, 383-384, it was specifically held that an action under the Jones Act was within the jurisdictional provision of old Section 24 of the Judicial Code, now 28 U. S. C. 1331.

Moreover in *Lauritzen* v. *Larsen,* 1953, 345 U. S. 571, this court held that the district court had *jurisdiction* of a Jones Act action by a Danish seaman for injury sustained on a Danish vessel while in Cuban waters,

although, the case having been tried, the court then held on the *merits* that he was not entitled under the Jones Act to recover damages. Respecting *jurisdiction* of the district court this Court said:

> *"The question of jurisdiction is shortly answered . . . A cause of action under our law was asserted here,* and the court had power to determine whether it was or was not well founded in law and in fact. Cf. *Montana-Dakota Co.* v. *Public Service Co.,* 341 U. S. 246, 249" (345 U. S. 574-575).

The language quoted, and the Court's citation of the *Montana-Dakota Co.* case distinguishes the question of jurisdiction from the issue of *merits,* as more fully shown, *infra,* Point II. And jurisdiction was definitely sustained even in the *Lauritzen* decision.

C

5. The question of jurisdiction of cases at law, wherein the subject matter is that of the Federal maritime law, in recent years has occasioned conflict of decisions.

Jurisdiction has been sustained by the First Circuit Court of Appeals in *Doucette* v. *Vincent,* 1st Cir. 1952, 194 F. 2d 834, and *Jansson* v. *Swedish American Line,* 1st Cir. 1950, 185 F. 2d 212.

Jurisdiction has been denied by the Third Circuit Court of Appeals in *Jordine* v. *Walling,* 3rd Cir. 1950, 185 F. 2d 662, and by the Second Circuit in *Paduano* v. *Yamashita Kisen Kabushiki Kaisha,* 2d Cir. 1955, 221 F. 2d 615, and in the case at bar. See also *Troupe* v. *Chicago, Duluth & Georgian Bay Transit Co.,* 2d Cir. 1956, 234 F. 2d 253; and *McAfoos* v. *Canadian Pacific Steamship* Lines, 2d Cir. 1957, 243 F. 2d 270.

The conflict between the First and Third Circuits was noted by this Court in *Pope & Talbot Inc.* v. *Hawn,* 1953,

346 U. S. 406, 410, footnote 4, where, because of diversity sufficient to support jurisdiction, this Court said:

> "In this situation we need not decide whether the District Court's jurisdiction can be rested on 28 U. S. Code, sec. 1331 as arising 'under the Constitution, laws or treaties of the United States'. See *Doucette* v. *Vincent*, 194 F. 2d 834 and *Jansson* v. *Swedish American Line*, 185 F. 2d 212. Cf. *Jordine* v. *Walling*, 185 F. 2d 662."

In the *Paduano* case, the Second Circuit disagreed with the First Circuit, and disagreed with the reasoning while agreeing with the result in the Third Circuit case; and specifically stated that "the conflict must ultimately be resolved by the Supreme Court" (221 F. 2d 617).

Both the *Troupe* and *McAfoos* decisions indicate doubt respecting the *Paduano* decision, saying in *Troupe* "If that decision is to be adhered to" (234 F. 2d 257), and saying in *McAfoos* that "it is not clear whether or not these theories can be pursued in a Federal court. See *Troupe*" (243 F. 2d 271).

In the case at bar the lower courts, nevertheless, cited and relied on the *Paduano* case; and the conflict in the three circuits is now presented for determination by this Court.

6. In *Jansson* v. *Swedish American Line, supra,* 185 F. 2d 212, at 217-218, Chief Justice McGruder reasoned infallibly as follows; and quoting from *Knickerbocker Ice Co.* v. *Stewart:*

> "*If the 'Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law,'* and if, when a cause of action cognizable in admiralty is sued on at common law, either in a state court or on the law side of a federal district court, *the court must apply the general maritime law rather than the law of the state of the*

> *forum,* and *if the judgment of a state court in such a case is reviewable by the United States Supreme Court because a federal question is necessarily involved, then it would plainly follow,* we think, that a civil action for damages filed on the law side of a federal district court, to enforce a claim cognizable in admiralty, may be maintained in the district court pursuant to 28 U. S. Code, sec. 1331 as a case arising 'under the Constitution, laws or treaties of the United States'—assuming, of course, that the requisite jurisdictional amount is present, and that the venue requirements of 28 U. S. Code, sec. 1391 are met. This would be so whether or not diversity of citizenship also existed, for such diversity, if present, would only be a cumulative or additional basis of jurisdiction under 28 U. S. Code, sec. 1332." (Italics ours.)

This reasoning is in accord both with the comparable language of 28 U. S. C. Sec. 1331 and Article III, section 2 of the Constitution and with the statement, above quoted, made by Senator Carpenter when the Act of 1875 was before Congress (Hart & Wechsler, *The Federal Court and the Federal System,* p. 75).

By contrast the conclusion in *Jordine* that "a cause of action *arising under the maritime law* is to be regarded as *non-federal* in character" (185 F. 2d 671) and the confusion in *Paduano* between cases of "admiralty and maritime *jurisdiction*" and cases at law based on substantive maritime "*law*" are completely fallacious.

As said by Chief Justice McGruder in *Doucette* v. *Vincent, supra,* 1952, 1st Cir. 194 F. 2d 834, 843:

> "But at the time of the adoption of the Constitution it was well known that many cases which, because of their subject matter, were cognizable *in* a court of admiralty, might *also* be prosecuted by a personal action for damages *in* a court of common law, for instance, actions ex contractu for seamen's wages or for

breach of a charter party, or actions ex delicto for personal injuries, or injuries to property by collision or otherwise. See 1 Benedict on Admiralty, sec. 20 et seq. (6th ed., 1940); *Schoonmaker* v. *Gilmore*, 102 U. S. 118 (1880); *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 388, 1924 A. M. C. 551 (1924). Such common law cases were not cases *in* admiralty, though the claims sued on were also cognizable *in* admiralty. They were 'Cases *in* Law.'" (Italics ours.)

This is the distinction between cases "*in* law" and cases "of admiralty and maritime *jurisdiction*" under Article III, sec. 2 of the Constitution.

It also is the distinction under the saving clause, 28 U. S. C. Sec. 1333, between a civil case "of admiralty or maritime *jurisdiction*", of which the district courts have exclusive *admiralty jurisdiction*, and the "*all other remedies*" saved to suitors "in *all* cases."

It is this distinction between cases arising under the Constitution and laws of the United States and cases involving exercise of admiralty and maritime "*jurisdiction*" which was recognized in *American Insurance Co.* v. *Canter*, 1828, 1 Peters (26 U. S.) 511 and in *The City of Panama*, 1879, 109 U. S. 453; and the *Paduano* decision misinterprets the *American Insurance Co.* decision in this respect.

The Federal District Courts on the law side, alike with the State courts, cannot exercise admiralty and maritime "*jurisdiction*", i.e., jurisdiction "*in* admiralty", as distinct from "*all other remedies*" saved by 28 U. S. C. Sec. 1333 to "suitors in *all cases*". But where "the matter in controversy" is one based on the substantive maritime *law* of the United States, which, if brought in a State Court would be reviewable by this Court as one arising under the Constitution, laws or treaties of the United States, the Federal District Courts now have original jurisdiction thereof under 28 U. S. C. Sec. 1331, if such matter in controversy also exceeds the sum or value of $3,000.00.

7. As this Court has frequently held, the substantive general maritime law of the United States is a part of the laws of the United States.

The Lottawanna, 1874, 21 Wall. (88 U. S.) 558, 573, 576;
Knickerbocker Ice Co. v. *Stewart*, 1920, 253 U. S. 149, 160;
Carlisle Packing Co. v. *Sandanger*, 1922, 259 U. S. 255, 259;
Panama Railroad Co. v. *Johnson*, 1924, 264 U. S. 375, 385, 386;
Uravic v. *Jarka Co.*, 1931, 282 U. S. 234, 240;
Garrett v. *Moore McCormack Co.*, 1932, 317 U. S. 239, 245, 246;
O'Donnell v. *Great Lakes Dredge & Dock Co.*, 1943, 318 U. S. 36, 40;
Swanson v. *Mara Brothers*, 1946, 328 U. S. 1;
Seas Shipping Co. v. *Sieracki*, 1946, 328 U. S. 85, 88;
Pope & Talbot Inc. v. *Hawn*, 1953, 346 U. S. 406, 409.

As said in *The Lottawanna, supra*:

> "Each state adopts the maritime law, not as a code having any independent or inherent force, *proprio vigore*, but as *its own law*, with such modifications and qualifications as it sees fit. Thus adopted and thus qualified in each case, it becomes the maritime *law* of the particular nation that adopts it. And without such voluntary adoption it would not be law . . .
>
> "To ascertain, therefore, what the maritime *law* of this country is, . . . The decisions of this court . . . are especially to be considered; and when these fail us, we must resort to the principles by which they have been governed" (21 Wall. 573, 576). (Italics ours.)

In *Knickerbocker Ice Co.* v. *Stewart, supra,* this Court said:

> *"The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law* and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction" (253 U. S. 160). (Italics ours.)

Again in *The Lottawanna* case at page 574:

> *"That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesman of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.'"* (Italics ours.)

While, therefore, as distinct from *proceedings in* admiralty, *"Proceedings in* a suit at common law . . . are precisely the same as in suits . . . not regarded as maritime, wholly irrespective of the fact that the injured party might have sought redress *in the admiralty"* (*The Belfast,* 1868, 7 Wall. (74 U. S.) 624, 645); it is now well settled that in such a case the substantive general maritime *law* of the United States must be applied, for the simple reason that it is the substantive *law* of the United States, whether the civil action be in a State court (*Garrett* v. *Moore McCormack, supra,* 1942, 317 U. S. 239, 245, 246) or on the law side of the United States District Court (*Pope & Talbot, Inc.* v. *Hawn, supra,* 1953, 346 U. S. 406, 490; *Seas Shipping Co.* v. *Sieracki, supra,* 1946, 328 U. S. 85, 88).

The substantive general maritime law of the United States is, therefore, equally a part of the "Constitution, laws, or treaties of the United States" within the jurisdictional provisions of 28 U. S. C. Sec. 1331, as are any other provisions of substantive Federal law.

8. In the *Paduano* decision and this case the lower courts have failed to note the difference between the comprehensive and unqualified term "laws of the United States" in the jurisdiction provisions of Art. III, Sec. 2 of the Constitution, *which 28 U. S. C. A. Sec. 1331 employs*, and the qualified term "laws of the United States, *which shall be made* in pursuance thereof", in the supremacy provision of Art. 6 of the Constitution, which Sec. 1331 does *not* employ. It thus conflicts in principle with *Mayor* v. *Cooper*, 1867, 6 Wall. (73 U. S.) 247, 253, where this distinction is noted and where this Court said:

> "The decisions of the courts of the United States within their sphere of action, are as conclusive as the laws of Congress made in pursuance of the Constitution."

9. The case also conflicts in principle with *Erie R. R. Co.* v. *Tompkins*, 1938, 304 U. S. 64, interpreting the term "laws of the several states" in 28 U. S. C. Sec. 1652,* and with *Warren* v. *United States*, 1951, 340 U. S. 523, interpreting the term "national laws" in Art. 2, par. 2 of the Shipowners Liability Convention (54 Stat. 1693).

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* One commentator (*The Extension of Federal Question Jurisdiction to Maritime Claims: A New Jurisdictional Theory* (1952), 66 Harvard L. Rev. 315, 324) has stated that:

> "The authorities cited by the *Jordine* case to support its position simply *do not establish or even imply that 'laws' in Section 1331 excludes decisional law, and there appear to be no holdings elsewhere to that effect.* It may, however, be significant that *Erie R. R.* v. *Tompkins* interpreted the word 'laws' in another statute to include decisional law."

Another commentator five years earlier (*The Tangled Seine: A Survey of Maritime Personal Injury Remedies* (1947), 57 Yale L. J. 243, 245), had said of *Southern Pacific Co.* v. *Jensen*, 1917, 244 U. S. 205, that:

> "The case represents the *Erie* v. *Tompkins* of the admiralty field except that the shoe is on the other foot, the state courts being obliged to follow 'substantive' law as declared by the Supreme Court, but left free to apply their own 'procedure'."

In those cases this Court held that such provisions include unwritten as well as written law, whether legislative or Court-made.

The recent six-year conflict of the Circuits, respecting the words "laws of the *United* States" in Section 1331, indeed, is remarkably comparable to the century of mistake in interpreting the opposite, complementary and comparable term "laws of the *several States*" in Section 1652; corrected when *Erie R. R. Co.* v. *Tompkins*, 1938, 304 U. S. 64, overruled *Swift* v. *Tyson*, 1842, 16 Pet. (41 U. S.) 1, 18.

Whereas *Swift* v. *Tyson* held that "laws" meant only statutes, the *Erie R. R. Co.* v. *Tompkins* decision overruled this and held that it included law "*unwritten* as well as written", "*unwritten 'general law'*", "*substantive* rules" of law "be they commercial law or a part of the law of torts" announced by the voice adopted by the State as its own "*whether it be of its Legislature or of its Supreme Court*" (304 U. S. 73, 74, 78, 79). It pointed out that the opposite doctrine "prevented uniformity" (304 U. S. 74) "prevented uniformity in the administration of the law" (304 U. S. 75), and occasioned "injustice and confusion" (304 U. S. 77).

In *Warren* v. *United States*, 1951, 340 U. S. 523, the Supreme Court applied the doctrine of *Erie R. R. Co.* v. *Tompkins* in interpreting the term "national laws" with reference to maritime law. The Shipowners Liability Convention (54 Stat. 1693) in Art. 2 provided liability for maintenance and cure in par. 1, subject to the proviso of par. 2 "that national *laws* or regulations may make exceptions in respect of" stated injuries or sickness. Congress had not enacted any statute to make any exception, although Secretary Hull and Chief Justice Stone thought this essential and legislation had at one time been introduced and passed in the House of Representatives. The Court held that the exceptions "are operative by virtue of the General Maritime Law and that no act of Congress is necessary to give them force" (340 U. S. 526), saying:

"The term law in our jurisprudence usually includes the rules of court decisions as well as legislative acts" (340 U. S. 526)

and that:

"Much of this body of maritime law had developed through the centuries in judicial decisions. To reject that body of law and start anew with a complete code would be a novel and drastic step" (340 U. S. 527).

We submit that the term "laws of the several states" in 28 U. S. C. Sec. 1652 and the opposite term "laws of the United States" in 28 U. S. C. Sec. 1331 are comparable and complementary terms in the Judicial Code, and that, equally as held of the Section 1652 term "laws of the several states" in *Erie R. R. Co.* v. *Tompkins,* the term "laws of the United States" in Section 1331 includes decisional law, whether originally antedating and incorporated by the Constitution, or subsequently established by controlling decisions of this Court.

10. It was solely because (excepting the short lived Act of 1801, 2 Stat. ch. 4, repealed in 1802, 2 Stat. ch. 8) original jurisdiction was not granted by Congress to the lower Federal Courts in cases arising under the Constitution or laws of the United States until the Act of March 3, 1875, 18 Stat. c. 137, page 470, that *prior thereto* this Court held that the only remedy at law in federal courts in actions involving the maritime law was in diversity cases. See *The Belfast,* 1869, 7 Wall. (74 U. S.) 624, 643, 644; *Leon* v. *Galceran,* 1870, 11 Wall. (78 U. S.) 185, 188; and *Steamboat Co.* v. *Chase,* 1872, 16 Wall. (83 U. S.) 522, 533, *all decided before the Act of 1875.*

But in *The Belfast, supra,* this Court said, respecting the saving clause, in what is now 28 U. S. C. Sec. 1333:

"Observe the language of the saving clause under consideration. It is to *suitors,* and *not* to the State Court nor to the Circuit Courts of the United States.

> Examined carefully, it is evident that Congress intended by that provision *to allow the party to seek redress in the admiralty if he saw fit to do so, but not to make it compulsory in any case where the common law is competent to give him a remedy*" (7 Wall. 74 U. S. 644). (Italics ours.)

Similarly both in *Leon* v. *Galceran, supra,* and *Steamboat Company* v. *Chase, supra,* this Court said:

> "He may have an action at law in the case supposed *either in the Circuit Court or* in a State Court, because the common law, in such a case, is competent to give him a remedy, and *wherever the common law is competent to give a party a remedy in such a case, the right to such a remedy is reserved and secured to suitors by the saving clause* contained in the Ninth Section of the Judiciary Act" (11 Wall. (78 U. S.) 188, and 16 Wall. (83 U. S.) 533). (Italics ours.)

This language applies equally now to the remedy given by 28 U. S. C. Sec. 1331, as to the diversity remedy given by section 1332.*

For the *saving clause* even as originally worded *did not specify diversity* but specified rather "a common law remedy where the common law is competent to give it"; and the present *saving clause,* 28 U. S. C. Sec. 1333, does not specify diversity but specifies rather "*all* other remedies to which they are entitled".

The remedy by reason of the action being based on the substantive maritime law of the United States is equally as available under 28 U. S. C. Sec. 1331 as is the remedy based on diversity under Sec. 1332.

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* The *Paduano* argument respecting removability is as uncontrolling respecting cases under Sec. 1331 as it was of cases under Sec. 1332.

POINT II

The Court's failure to distinguish between jurisdiction and merits, depriving petitioner of his right to a trial of the merits in the manner prescribed by law.

Evidence on the merits should not have been admitted, and should have been stricken out; and the findings based thereon should be set aside.

A

This Court has repeatedly held that a complaint which sets forth a substantial claim under the Constitution or laws of the United States presents a case within the jurisdiction of the District Court, as a federal court; that there is a fundamental distinction between the question of jurisdiction and the question of merits; that such jurisdiction cannot be made to stand or fall upon the way the court may decide the legal sufficiency of the facts alleged or the legal sufficiency of facts proven; and that its decision either way upon either question "is predicated upon the existence of jurisdiction, not upon the absence of it."

Binderup v. *Pathe Exchange,* 1923, 263 U. S. 291, 305, 306;
The Fair v. *Kohler Die & Specialty Co.,* 1913, 228 U. S. 22, 25;
Bell v. *Hood,* 1946, 327 U. S. 678, 681, 682;
Alma Motor Co. v. *Timpkin Detroit Axle Co.,* 1946, 329 U. S. 129, 130;
Swafford v. *Templeton,* 1902, 185 U. S. 487, 491, 493, 495;
Huntington v. *Laidley,* 1900, 176 U. S. 688;
Louisville Trust Co. v. *Knott,* 1903, 191 U. S. 225, 233;
Public Service Co. v. *Corboy,* 1919, 250 U. S. 153, 162-163;
Smithers v. *Smith,* 1907, 204 U. S. 632, 645;
Barry v. *Edmunds,* 1886, 116 U. S. 550, 565;

Wetmore v. *Rymer*, 1898, 169 U. S. 115, 122, 128;
Illinois Central Railroad v. *Adams*, 1901, 180 U. S. 28, 34-35;
Venner v. *Great Northern Railway*, 1908, 209 U. S. 24, 34-35.

In *Bell* v. *Hood, supra*, 1946, 327 U. S. 678, 681, 682, reversing both lower courts and sustaining jurisdiction on the plaintiff's complaint, this Court held that "the district court must look to *the way the complaint is drawn* to *see if it is drawn so as to claim* a right to recover under the Constitution and laws of the United States." This Court further said that:

> "Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact *it must be decided after and not before the court has assumed jurisdiction over the controversy.* If the Court does later *exercise* its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the *merits*, not for want of jurisdiction." (Italics ours.)

In *Smithers* v. *Smith, supra*, 1907, 204 U. S. 632, 645, this Court reversing a dismissal, disapproved of trying "part of the controversy" on jurisdictional hearing (204 U. S. 644), and said:

> "For it must not be forgotten that where in good faith one has brought into court a cause of action, which, *as stated by him*, is clearly within its jurisdiction, *he has the right to try its merits in the manner provided by the Constitution and law, and cannot be compelled to submit to a trial of another kind.* This was clearly stated by Mr. Justice Matthews in *Barry* v. *Edmunds*, 116 U. S. at page 565 . . ." (Italics ours.)

In *Binderup* v. *Pathe Exchange, supra,* 1923, 263 U. S. 291, 306, this Court said:

> "*Jurisdiction,* as distinguished from *merits,* is wanting only where the claim set forth in the complaint is so unsubstantial as to be frivolous or, in other words, is plainly without color of merit."

The question carefully reserved by this Court in *Plamals* v. *Pinar del Rio, supra,* 1928, 277 U. S. 151, 155, and undetermined in either *Uravic* v. *Jarka Co., supra,* or *Lauritzen* v. *Larsen, supra,* certainly is not frivolous.

In *Illinois Central Railroad Co.* v. *Adams, supra,* 180 U. S. 28, 34-35, by Mr. Justice Brown, and in *Venner* v. *Great Northern Railway, supra,* 209 U. S. 24, 34-35, by Mr. Justice Moody this Court said:

> "Jurisdiction is the right to put the wheels of justice in motion and to proceed to the final determination of a cause upon the pleadings and evidence. . . . It may undoubtedly be shown in *defense* that plaintiff has no right under the allegations of his bill or the facts of the case to bring suit, *but that is no defect of jurisdiction,* but of title. It is as much so as if it were sought to dismiss an action of ejectment for the want of jurisdiction, by showing that the plaintiff had no title to the land in controversy. At common law neither an infant, an insane person, married woman, alien enemy, nor person having no legal interest in the cause of action, can maintain a suit in his or her own name; but it never would be contended that the court would not have *jurisdiction* to inquire whether such disability in fact existed, *nor that the case could be dismissed on motion for want of jurisdiction.*" (Italics ours.)

It clearly was error in the case at bar to dismiss the action for "lack of jurisdiction of the subject matter".

The Court has and must first exercise jurisdiction of the subject matter in order to determine the question of merits whether the plaintiff is entitled to a recovery under the law and facts pleaded in his complaint.

B

Petitioner submits further that for the foregoing reasons, the evidence offered by respondent, Compania respecting the alleged contract of the seaman and the law of Spain should have been excluded on plaintiff's objection and should have been stricken out on plaintiff's motions to strike the same, and that the findings based thereon should be set aside as clearly erroneous.

In *The Fair* v. *Kohler Die & Specialty Co., supra,* 1913, 228 U. S. 22, 25, *this court specifically distinguished in this respect the jurisdictional question when jurisdiction is rested on the plea of a federal statutory cause of action, and the jurisdictional issue where jurisdiction is rested on diversity of citizenship.* In the latter case *diversity* jurisdiction depends on whether in fact plaintiff's citizenship is diverse from defendant's and *diversity* jurisdiction may be defeated by a plea of the citizenship of the parties; a pre-trial hearing thereon may be had and evidence taken and findings made *as to the jurisdictional issue of diversity.* This is because diversity has nothing to do with the merits. But this Court specifically held that, by contrast,

> "when the plaintiff bases his cause of action upon an act of Congress, *jurisdiction cannot be defeated by a plea denying the merits of the claim"* (228 U. S. 25). (Italics ours.)

The decision herein overruling plaintiff's objection to the course pursued and the taking of evidence on the merits and denying plaintiff's motion to strike the testimony and exhibits (R. 247a; plaintiff's claim of surprise, R. 8a; objections, R. 19a-22a; exception, 176a; motion to

strike, R. 104a-106a, 173a, 176a-177a) thus conflicts either directly or in principle with this Court's decision in *The Fair* v. *Kohler Die & Specialty Co.*, and other decisions herein above cited, pages 33-34, *supra.*

The District Court referred to 5 Moore's Federal Practice, 2d Ed., pages 38, 36 (R. 41a-42a) which, however, relates to an issue of jurisdiction *"such as diversity"*; and this points up the error of the lower courts in failing to apply herein the distinction specifically made by this Court in *The Fair* v. *Kohler Die & Specialty Co., supra.*

C

The evidence taken herein also was improper and the findings made thereon are clearly erroneous because the contract offered and admitted and on which the findings were based *covered only a prior voyage and not the voyage here involved.*

This is a question of contract—of agreement by the parties—rather than of conflict of laws; and plaintiff is entitled to a jury trial thereof (*South Chicago Coal & Dock Co.* v. *Bassett,* 1940, 309 U. S. 251; *Senko* v. *La Crosse Dredging Co.,* 1957, 352 U. S. 370). On the one hand respondent Compania and the lower court contend that Spanish law applies because Romero *agreed* that Spanish law apply; on the other hand they contend that this agreement is *imposed* by Spanish law—contrary to the text of the only agreement he made that it be limited to only a prior voyage.

D

Moreover, since the action is based on the Jones Act which is incompatible with any such agreement, the alleged agreement for this reason also is immaterial and inadmissible in such action.

The Jones Act incorporates the Federal Employers Liability Act; and the injured seaman accordingly has the

benefit of Section 5 of the Federal Employers Liability Act (45 U. S. Sec. 55), which provides that:

> "Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void."

Construing such Section 5, this Court has held in *Phila. B. & Wash. R. Co.* v. *Schubert,* 1912, 225 U. S. 603, 613, that "the purpose or intent" mentioned do not refer simply to an actual intent of the parties to circumvent the statute, but that the purpose and intent of the contract or regulations "is to be found in their necessary operation and effect in defeating the liability which the statute was designed to enforce".

In *Duncan* v. *Thompson,* 1942, 315 U. S. 1, 6, this court held that "Congress wanted Section 5 to have the full effect that its phraseology implies."

Construing together the Jones Act election right (46 U. S. C. Sec. 688), and this incorporated provision of Sec. 5 of the Employers' Liability Act (45 U. S. C. Sec. 55), it is clear on the merits that "Any seamen" entitled to the benefits of the Jones Act and electing to sue thereon cannot be deprived of the benefits thereof by any advance contract, rule, regulation, or device to have the law of a foreign country apply instead, and that any such contract provision is invalid and inadmissible in a Jones Act action.

E

The issue whether defendant Garcia is liable under the Jones Act, or is a husband of the ship who could not be liable as employer under the Jones Act, petitioner submits, is also an issue of merits which cannot properly be heard, tried and determined on a motion to dismiss for "lack of jurisdiction of the subject matter"; and

the evidence and findings thereof should be stricken out. In view of the extraordinary circumstances alleged, moreover, this issue cannot be determined without the court exercising jurisdiction and trying the case on the merits before a jury.

The lower courts' decision herein as respects Garcia, is not in accord with but conflicts in principle with *Cosmopolitan Shipping Co.* v. *McAllister,* 1949, 337 U. S. 783, relied on by the Court (R. p. 252a; Appendix to Petition, p. 45), and with *Fink* v. *Shepard S. S. Co.,* 1949, 337 U. S. 810, and *Weade* v. *Dichmann, Wright & Pugh, Inc.,* 1949, 337 U. S. 801, simultaneously decided therewith.

Cosmopolitan Shipping Co. v. *McAllister,* was decided as *a determination of the merits after full trial of the case and verdict by a jury.*

It involved a general shipping agent of the United States Government under a war shipping contract subject to the War Shipping Administration (Clarification) Act, 57 Stat. 45, 40 U. S. C. Sec. 1291; and does not preclude *pro hac vici* ownership as between private owners and operators. The agent had only the duties of a husband to take care of shoreside business of the ship, but with no duties of a berthing agent which Garcia in this case had or as to actual management of the vessel.

The *Fink* case distinguishes for seamen a "party to such a relation with them that it could be held vicariously liable for their torts."

The *Weade* case, which also involved a judgment after trial for injuries on a War Shipping Administration vessel, held that it was erroneous to direct judgment notwithstanding the verdict, saying:

> "As there were suggestions in the complaint and evidence of alleged liability of respondent to petitioners for respondent's *own negligence* while acting

as general agent, this direction should not have been given" (337 U. S. 809).

The decision below conflicts in principle, in this respect and as respect the *pro hac vici* principle, also with *The Standard Oil Co.* v. *Anderson*, 1909, 212 U. S. 215; *Linstead* v. *Chesapeake & Ohio Ry. Co.*, 1928, 276 U. S. 28 and *Denton* v. *Yazoo & Mississippi Valley R. R. Co.*, 1932, 284 U. S. 305.

Petitioner submits that if an injured employee is a seaman it is not necessary under the Jones Act that a negligent employee be himself a seaman or member of the crew. Cf. *Pederson* v. *Delaware L. & W. R. Co.*, 1913, 229 U. S. 146, 150-151.

The motion herein was solely for a dismissal of the complaint upon the ground of lack of jurisdiction of the subject matter (R. 194, See District Court opinion in Appendix to Petition, p. 40). The sole question on which any pre-trial hearing could be had or evidence taken therefore was the issue of diversity. All the other evidence should have been excluded on plaintiff's objections and stricken out on plaintiff's motion to strike the same; and all findings based thereon should be set aside.

POINT III

In a case such as this, where a foreign seaman was gravely injured on a foreign ship in an American port and treated at length in an American hospital, the Jones Act clearly requires that the case be fully tried before a jury and precludes dismissal as for lack of jurisdiction of the subject matter or on foreign law defenses without trial of plaintiff's Jones Act and American law claims.

1. The great question under the Jones Act reserved by this Court in *Plamals* v. *Pinar del Rio*, 1928, 277 U. S.

151, 155*, *supra,* and undetermined in either *Uravic* v. *Jarka,* 1931, 282 U. S. 234, *supra,* or in *Lauritzen* v. *Larsen,* 1953, 345 U. S. 571, *supra,* this Court stated as follows:

> "whether the provisions of Section 33 are applicable where a foreign seaman employed on a foreign ship suffers injuries while in American waters" (277 U. S. 155).

The very reservation of that question in *Plamals* v. *Pinar del Rio, supra,* is indicative of its importance and substantial character and that it is a question which this Court must review and settle.

The comparable question presented by petitioner's case is more specifically whether Section 33 of the Jones Act is applicable, where an alien seaman is injured on a foreign vessel in an American port and is treated therefor at length in an American hospital.

That question is a principal "subject matter" of the action against Compania and Garcia; its determination requires a full trial of the case on the merits before a jury; this precludes piece-meal trial of foreign law defenses, and precludes dismissal for lack of jurisdiction of the subject matter.

2. Four provisions of the Jones Act (Act of June 5, 1920, c. 250, 41 Stat. 988-1008, and of the Federal Em-

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* *Plamals* v. *Pinar del Rio,* 1928, 277 U. S. 151, 155, *supra,* was the first case to reach this court involving a Jones Act claim of an alien seaman injured on a foreign vessel in the United States. A seaman on a British vessel sued in rem under the Jones Act. The District Court dismissed the libel at trial on the theory that the Jones Act was inapplicable and the British Compensation law applied. But this Court held instead that the Jones Act did not provide a lien enforceable by in rem proceedings; and this Court specifically left open the question whether the provisions of Section 33 are applicable where a foreign seaman employed on a foreign ship suffers injuries while in American waters (277 U. S. 155).

ployers Liability Act, April 22, 1908, c. 149, Sec. 5, 35 Stat. 66, incorporated thereby) are of tremendous importance, viz.:

(1) the first clause of both substantive provisions of Section 33:

> "That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury . . . and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury."

(2) the provisions of the Federal Employers Liability Act, Sec. 5 (45 U. S. C. Sec. 55) incorporated by Section 33 of the Jones Act that,

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void."

See "D" of Point II, *supra*, pages 37-38.

(3) the provision of Section 36 of the Jones Act (41 Stat. 1007):

> "That if any provision of this Act is declared unconstitutional or the application of any provision to certain circumstances be held invalid, the remainder of the Act and the application of such provisions to circumstances other than those as to which it is held invalid shall not be affected thereby."

(4) the public policy stated in the first section or preamble of the Jones Act (41 Stat. 988) and further evidenced in other provisions thereof as well as Section 33.

3. Of great importance in their interpretation also is the history of progress of H. R. 10378 through Congress, with the foregoing provisions added in a great body of amendments made to the bill following this court's decision in *Strathearn SS. Co.* v. *Dillon*, 1920, 252 U. S. 348; and the debate in Congress showing how fully Congress had in mind and intended fully to exercise the jurisdiction and power of the nation over foreign seamen and foreign shipping within ports of the United States.

4. H. R. 10378 was introduced in the House by Representative Green of Massachusetts on November 5, 1919 (Congressional Record, 66th Congress, First Session, p. 7998); debated (*Id.*, pp. 8142, 8173); passed (*Id.*, p. 8173), and referred to the Senate Committee on Commerce (*Id.*, p. 8267).

In the House, Representative Green stated at page 8142, that:

> "I believe the question of the American Merchant Marine is the most important question that has been brought to the attention of this House,"

pointing out that:

> "There were but seven American vessels in the overseas trade before the late war in 1914."

However, H. R. 10378 as thus introduced and passed in the House contained no provision comparable to Section 33 or either of the four provisions first above mentioned. This was notwithstanding that this court had held in *Chelentis* v. *Luckenbach S. S. Co.*, 1918, 247 U. S. 372, decided June 3, 1918, a year and five months before H. R. 10378, that Section 20 of the Seamen's Act of March 4, 1915, c. 153, 38 Stat. 1185 had created no cause of action for seamen injured through negligence. Hence, as will be further seen, it was not *Chelentis*

v. *Luckenbach S. S. Co.*, so much as *Strathearn S. S. Co.* v. *Dillon*, which inspired the scope and language of the Senate Jones Act amendments.

5. For, thereafter on March 29, 1920 this court decided *Strathearn S. S. Co.* v. *Dillon*, 1920, 252 U. S. 354, which sustained provisions of Section 4 of the Seamen's Act of 1915, c. 153, 30 Stat. 1164 which amended Revised Statutes Section 4530, as applicable to foreign seamen on foreign ships while in harbors of the United States, to enable them to demand one-half wages then earned, and providing that "and the courts of the United States shall be open to such seamen for its enforcement."

Respecting this provision, in the proviso making the statute applicable to seamen on foreign ships while in harbors of the United States, this Court said:

> "The proviso does not stop there, for it contains the express provision that the courts of the United States shall be open to seamen on foreign vessels for its enforcement. *The latter provision* is of the utmost importance in determining the proper construction of this section of the act. It manifests the purpose of Congress to give the benefit of the act to seamen on foreign vessels, and to open the doors of the federal courts to foreign seamen. *No such provision was necessary as to American seamen, for they had the right independently of this statute to seek redress in the Courts of the United States, and, if it were the intention of Congress to limit the provision of the act to American seamen, this feature would have been wholly superfluous.*" (Italics ours.)

It is this reasoning which manifestly influenced the amendments proposed within 37 days thereafter to H. R. 10378.

Similarly, in *Strathearn S. S. Co.* v. *Dillon—An Unpublished Opinion by Mr. Justice Brandeis,* 69 Harvard L. Rev. 1179, 1189, Mr. Justice Brandeis had written:

> "Furthermore, *the last clause* of the proviso, in declaring our courts open to such seamen, *makes clear that the proviso applies to foreign seamen. Americans shipped as seamen on foreign vessels were already entitled to resort to our courts to enforce rights against the vessel. The Falls of Keltie,* 114 Fed. 357; *The Neck,* 138 Fed. 144; *The Epsom,* 227 Fed. 158. Our courts of admiralty possessed, in the absence of treaty provisions to the contrary, jurisdiction also in controversies between a foreign vessel and her officers or crew; but our courts usually decline, as a matter of discretion, to entertain law suits by foreign seamen; *The Belgenland, supra.* By treaties with some countries, our courts were precluded from doing so. *The Salomoni,* 29 Fed. 534; *The Burchard,* 42 Fed. 608; *The Koenigin Luise,* 184 Fed. 170. Consequently *foreign* seamen needed *a grant of the right to sue.*" (Italics ours.)

Thereafter on May 4, 1920—*just 37 days after the decision in Strathearn S. S. Co.* v. *Dillon, supra*—the Senate Committee on Commerce reported out H. R. 10378 (Congressional Record, 66th Congress, Second Session, p. 6494) by report No. 573 with 149 proposed amendments including Section 33, then numbered Section 36*, as amendment No. 139.

And the above quoted provision from Section 33—that any seaman injured "may, at his election, maintain an action for damages at law, with the right to trial by jury"—*is equally a provision which was not necessary and would be superfluous, as to American seamen,* as was

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*The section as proposed by the Senate did not include the venue clause later added by the House.

the provision emphasized in *Strathearn S. S. Co.* v. *Dillon, supra;* and therefore, equally "is of the utmost importance in determining the proper construction" of Jones Act Section 33 and manifests the purpose of Congress to give the benefit of Section 33 to seamen on foreign vessels injured in ports of the United States.

If American seamen only were to be included by the Jones Act, it would have been necessary only to enact a provision that the Federal Employers' Liability Act should apply to American seamen, and without enacting at all the quoted first clause. For 28 U. S. C. Sec. 1331, without more, would then afford any American seaman jurisdiction of an action at law based on such a statute; and in an action at law under Sec. 1331 the American seaman would be entitled to a jury trial. The Seventh Amendment of United States Constitution, indeed, would guarantee jury trial.*

But with reference to a foreign seaman injured here, and requiring hospitalization and treatment here, the affirmative provision that he "may, at his election, maintain an action for damages at law, with the right of trial by jury" is highly significant and apt. For in his case this provision is effective to enable him to elect between Jones Act rights and foreign law rights, and thus preclude the tort feasors from defeating his action under the Jones Act by pleading as defense a different right and remedy under foreign law or foreign contractual provisions.

In its Report No. 573 the Committee pointed out:

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* It is significant that, by comparison, the Federal Employers' Liability Act itself contains no similar provision that the injured railway employee may at his election maintain an action for damages at law with a right of trial by jury—this, for the very obvious reason that he would have such right under 28 U. S. C. Sec. 1331 and the Seventh Amendment, once the liability provision, 45 U. S. C. Sec. 51, was enacted.

"Years ago our great commercial rivals said, 'To hell with American ships!' That spirit exists today . . .

That is what we must meet. We are going to meet it not in the spirit of destruction, but in the spirit of fair play and with a determination to secure our just portion of the world's carrying trade.

. . . No halting, hesitating, doubting policy will succeed. We must take risks. We must encourage our capital and energy to go into this contest and assure them that we are behind them to build up and sustain rather than tear down. With this assurance no one can doubt our success.

. . . Our ship owners and ship operators must be placed as nearly as possible on an equality in operating costs and operating conditions with their competitors. Unless proper steps are taken to do these things it will be but a short time until our fleet will be dissipated and our flag driven from the sea, and we will again be in the same dependent and humiliating position we were before the war. . . .

We assert the need of a merchant marine for national defense and for our commercial growth and declare it to be our policy to do whatever may be necessary to meet this need." (Senate Report No. 573, 66th Congress, Second Session, pp. 1-3.)

On unanimous consent H. R. 10378 with the proposed amendments was before the Senate as committee of the whole on May 10, 1920 (Congressional Record, 66th Congress, Second Session, p. 6803) and after debate was passed with amendments on May 20, 1920 with a request for conference with the House on the bill and amendments, with appointed conferees (*Id.*, p. 7420) for which the House appointed conferees May 22, 1920 (*Id.*, p. 7504).

6. Section 33 was not the only section amendatory of the provisions of the Seamen's Act in their application to foreign vessels.

Several amendatory sections preceding Section 33 affected foreign ships and foreign seamen in American ports; and these and resulting debate disclosed full familiarity of Senator Jones and others sponsoring the bill with the decision in *Strathearn S. S. Co.* v. *Dillon, supra,* and explanation by them of the purpose of the bill to utilize fully the power there recognized.

The first section or preamble, containing the statement of policy above mentioned was agreed to May 10, 1920 without debate (Congressional Record, 66th Congress, Second Session, p. 6505).

On May 14, at page 7306 an amendment to Revised Statutes Section 4530 was agreed upon to further tighten the effect in the case of foreign seamen and foreign ships. The *Strathearn S. S. Co.* v. *Dillon* decision, while treating the section as applicable to foreign seamen and foreign ships had interpreted its provisions as including "wages earned from the beginning of the voyage" (252 U. S. 357). Senator Jones explained the purpose of amendment to carry out the original intention, that whenever a seaman can make such a demand, he can demand half of what is due then and remaining unpaid (*Id.,* p. 7036). The following is quoted from page 7037:

> "Mr. King: Does the Senator say that *the Supreme Court has held that we have jurisdiction over the foreign seamen and foreign ships?*
>
> Mr. Jones of Washington: Under the present statute *we have such jurisdiction in our ports.*
>
> The Supreme Court held that act to be unconstitutional* only a short time ago.
>
> Mr. King: A vessel, then, that sails under the Norwegian flag, for instance, with Norwegian sailors, if it touched at an American port for a day would be-

* Manifestly error for "constitutional". See last paragraph on page 7036, and see the *Strathearn S. S. Co.* v. *Dillon* decision.

come subject to the jurisdiction of our courts and the provisions of this proposed law, and the sailors could invoke the law for their protection?

Mr. Jones of Washington: Yes; while in an American port. It was one of the main contentions, the Senator from Utah will remember, in favor of the seamen's act, that it would, instead of placing a great burden on our seamen and shippers, bring the wages of the seamen of other countries up to a level with our own. This provision is intended to aid in carrying out that great purpose." (Italics ours.)

At page 7043 in reference to another amendment Senator Jones further said:

"The Supreme Court has upheld this section *and has also upheld the right of Congress to deal with foreign seamen in our ports.*" (Italics ours.)

Almost immediately following on page 7044, the amendment to add Section 36 (later numbered Sec. 33) was agreed to with no further discussion.

At page 7315 Senator Jones said with reference to what became Section 34 calling for abrogation of treaties restricting the right of the United States to impose discriminatory customs duties that:

"We are not seeking a war of retaliation but, Mr. President, we are not running away from it. As the Senator said, we are in a better position now to meet a war of retaliation."

In House Reports, numbers 1093, June 2, 1920, 1102 of June 3, 1920 and 1107 of June 4, 1920 (66th Congress, Second Session, 1919-1920, House Reports, Volume 3) the House proposed the venue clause.

On June 4, 1920 Senator Jones stated (Congressional Record, 66th Congress, p. 8470):

"I deem it just to say that the conferees from both sides of the chambers and from both branches of Congress have worked on this bill with the sole purpose of reporting to the Senate a bill that would build up the American Merchant Marine."

On June 4, 1920 at page 8599 Representative Green stated:

"I ask for the adoption of this conference report because I know that the American Merchant Marine will be firmly established after these bills have been enacted into law and if there is anyone here who does not favor this bill because of any reason, unless it be a very valid one, I propose to classify him who objects to this bill and who votes against its enactment into law as an affiliated agent of the British Lloyds and to put those who vote for the bill as valuable agents of the American Bureau of Shipping. (Applause.)

You can take your choice. I do not care how you vote, but you should not vote a penny to aid the British Lloyds, from the treasury of the United States."

On the same day, at page 8607 Representative Cameron said:

"Now, then, I want such American merchant marine. (Applause.) We cannot get it unless we follow a policy that will enable us with greater wages on the world's highway to sail ships. If we get a merchant marine we have to contrive some means to make up the difference between what it costs the world to sail on the world's highways and what it costs us."

7. It is thus apparent that the whole spirit in which H. R. 10378 (The Jones Act) was enacted was for utilizing to the full the national power and jurisdiction to impose on foreign ship owners in favor of foreign seamen while

in our ports, the same liability imposed on American ship owners so as to equalize, to the extent possible, the operating costs.

It is manifest also that this Court's decision in *Strathearn S. S. Co.* v. *Dillon*, 1920, 252 U. S. 348, thirty-seven days before the amendments of this character, including amendment No. 139 which became Section 33, were proposed in Senate Report No. 573 on May 4, 1920, was a principle inspiration for these provisions.

It is clearly manifest moreover, that the provision of Section 33 that "Any seaman who shall suffer personal injury in the course of his employment, may, at his election, maintain an action for damages at law, with the right of trial by jury", was inspired by the reasoning in *Strathearn S. S. Co.* v. *Dillon* that no such provision was needed in the case of American seamen, whereas foreign seamen needed a grant of the right to sue; and that this clause had as its primary purpose the subjecting of foreign ship owners to liability for grave personal injuries sustained in American ports, and particularly where these then are treated at length in American hospitals.

8. As said in *U. S.* v. *Diekelman*, 1875, 92 U. S. 520, 525:

> "The merchant vessels of one country visiting another for the purpose of trade subject themselves to the laws which govern the port they visit so long as they remain."

In *Stewart* v. *Pacific Steam Navigation Co.*, 3 F. 2d 329, 1924 A. M. C. 1272, Judge Learned Hand denied a motion to set aside the service of the summons in an action by a British seaman for injury sustained on the deck of a British vessel while it was passing through the Panama Canal. Rejecting a contrary construction that would give advantage to foreign ships as against American ships, he said:

> "We all know that the purpose of Congress is directly the opposite."

In *Arthur* v. *Companie Generale Transatlantique*, 5 Cir., 1934, 72 F. 2d 662, the Fifth Circuit Court of Appeals reversed a District Court judgment which had dismissed for lack of jurisdiction an action under the Jones Act by a stevedore of unpleaded nationality, for injuries on a French vessel while discharging cargo in the harbor at Cristobal, Canal Zone, saying that "the right of action is given to all seamen regardless of nationality. Since the action arises under a law of the United States, diversity of citizenship is immaterial" (72 F. 2d 664).

In *Uravic* v. *Jarka Co.*, 1931, 282 U. S. 234, *supra*, this Court reversed the New York Court of Appeals and held a defendant employer liable under the Jones Act for death of a stevedore on a German vessel tied up at an American port. The Court distinguished the case of public armed vessels and, pointing to the fact that, as in *Wildenhus's Case*, 1887, 120 U. S. 1, crimes committed on private vessels are punishable by the territorial jurisdiction, said:

> "We see no reason for limiting the liability for *torts* committed there when they go beyond the scope of discipline and private matters that do not interest the territorial power" (282 U. S. 240). (Italics ours.)

The Court said:

> "The jurisdiction and the authority of Congress to deal with the matter are unquestionable and unquestioned. *Cunard S. S. Co.* v. *Mellon*, 262 U. S. 100, 124, *et seq.* The conduct regulated is of universal concern" (282 U. S. 238).

The Court rejected an argument that the venue clause and the lack of a lien "shows that seamen on a foreign vessel were not contemplated", saying:

> "But the question is not whether they were thought of for the purpose of inclusion, but whether they were intentionally excluded from a description that on its

face includes them . . . If the rule is wise there is no reason why it should not be universal. Wise or not, it is law and the question is why general words should not be generally applied. What would be the alternative? Hardly that the German law should be adopted. *It always is the law of the United States that governs within the jurisdiction of the United States, even when for some special occasion this country adopts a foreign law as its own*" (282 U. S. 239, 240). (Italics ours.)

8. Petitioner submits, moreover, that in every sense the case at bar on the merits is one involving torts which "go beyond the scope of discipline and private matters that do not interest the territorial power" (*Uravic* v. *Jarka Co., supra,* 282 U. S. 240), and which are of intense interest to the territorial power and its citizens and are consequently within its Jones Act legislation.

The injury to petitioner herein was sustained during unloading operations while the vessel was tied up at a pier in Hoboken, New Jersey; i.e., while "in a practical sense, the ship . . . was the inert ground or floor of activities that looked not to her, but to getting the cargo ashore", and "was due to hurried and imprudent unloading" (Cf. *The Germanic,* 1905, 196 U. S. 589, 597, 595).

Petitioner's left leg was severed and his right leg broken during the unloading operations on board the vessel while it was tied at the *American pier,* with *American workmen* as well as Spanish crew members aboard ship and involved in the tort. The injury and loss of blood placed petitioner at the door of death here in an *American port.* Spain or Spaniards could not save his life. An *American ambulance* rushed to the ship, took charge of petitioner and rushed him to an *American hospital,* under protection enroute of *American health, traffic and police regulations.*

He then was treated for *eight months in an American hospital;* the services of *American physicians, American*

surgeons and *American nurses* were required; it was necessary to obtain an artificial limb from an *American* source; and his amputated leg was buried in an *American cemetery.*

Of necessity, the *American Government* itself was obliged to take an interest. In order to permit extended *American hospitalization* essential to save the seaman's life, it was deemed necessary by immigration officials to reclassify petitioner to permit him to remain here to undergo hospitalization, and then to prosecute his claims to damages, instead of requiring him to depart as a foreign seaman within twenty-nine days after arrival, as would have been the case except for his tragic injury and extended and expensive treatment necessitated here. Both this and the prosecution of plaintiff's claims for damages have required the extended services of *American attorneys* for petitioner.

The bill of the American hospital for $3,750.60, as well as bills of other Americans for medical services, for the artificial limb, and for the American burial of his amputated leg, all remain unpaid, and are liens on plaintiff's claims against defendants herein. All these items, owing to Americans and remaining unpaid, are part of the damages sought to be recovered in the American courts. Petitioner's American attorneys also are unpaid.

Three American companies, whose employees were on board the vessel and are charged with negligence, are defendants in the action.

The tort and its consequences thus are in every sense American, and within the Act both literally and as construed in Uravic v. *Jarka Co., supra.*

9. In *Uravic* v. *Jarka Co.,* this Court cited *The Schooner Exchange* v. *McFaddon,* 1812, 7 Cranch (11 U. S.), 116, 136, 143, 144-146, in which Chief Justice Marshal distinguished the case of merchant vessels in our ports from that of foreign national ships of war. It emphasized the exclusive and absolute jurisdiction of the

nation within its own territory and the full and complete power of the nation.

In *Wilson* v. *Girard,* 1957, 354 U. S. 524, decided July 11, 1957, this Court cited *The Schooner Exchange* v. *McFaddon, supra,* in sustaining the jurisdiction of Japan to try an American soldier for the killing of a Japanese woman while he was on duty guarding, as a member of the American occupation forces in Japan, a machine gun and clothing at Camp Weir Range area, Japan. This was notwithstanding that American officials had originally claimed, under the provisions of the treaty with Japan, exclusive jurisdiction to try Girard and apply in his trial American law.

In *Wildenhus's Case,* 1887, 120 U. S. 1, 4-5, cited by this Court in *Uravic* v. *Jarka Co., supra,* this Court considered a Belgian treaty, Article XI of which reserved less from its waiver of jurisdiction than does Article XXIII contained in the Spanish Treaty of 1903 (Treaty Series, No. 422, reprinted by the Government Printing Office in February, 1954). Article XI of the Belgian treaty involved in *Wildenhus' Case* provided:

> "Disorders which disturb only the peace of the ship or those on board are to be dealt with exclusively by the sovereignty of the home of the ship, but those which disturb the public peace may be suppressed" (120 U. S. 18).

The Spanish treaty of 1903 in Art. XXIII more broadly excepted from any treaty waiver of American jurisdiction any disorder which should happen on board a Spanish vessel in the territorial waters of the United States

> "when the said disorders are of such a nature as to cause or be likely to cause a breach of the peace or serious trouble in the port or on shore, or when in such trouble or breach of the peace, a person or persons shall be implicated not forming a part of the crew."

Such waiver of jurisdiction as Art. XXIII contained was in large measure abrogated on July 1, 1916, in accordance with provisions of Sec. 16 of the Seaman's Act of March 4, 1915 (38 Stat. 1184), to which Sec. 33 of the Jones Act of June 5, 1920, c. 250, Sec. 33 (41 Stat. 1007) was an amendment. It provided for abrogation of "any other treaty provision in conflict with the provisions of this Act."

Article VI of the Spanish treaty also guarantees Spanish subjects "free access to the Courts . . . as well for the prosecution as for the defense of their rights."

As pointed out by Judge Brandeis in his unpublished opinion in *Strathearn S. S.* v. *Dillon, supra*:

> "The decided cases illustrate how narrow are the extra territorial rights conceded by the United States to foreign merchant vessels; and the tendency to restrict them further is indicated by our legislation" (69 Harvard Law Rev. 1185).

Section 36 of the Jones Act (41 Stat. 1007) is indicative moreover that no case arising under its provisions is to be dismissed because any preceding case involving different circumstances has been dismissed or ended without recovery. For under Section 36 if the application of any provision of the Jones Act (and, therefore, the application of Section 33) "to certain circumstances be held invalid . . . the application of such provisions to circumstances other than those as to which it is held invalid shall not be affected thereby." See also *Rogers* v. *Missouri P. R. Co.*, 1957, 352 U. S. 500; *Ferguson* v. *Moore-McCormack Lines*, 1957, 352 U. S. 521

The provision of the Jones Act is not that any seaman may institute, subject to dismissal, but that he may "*maintain*" an action for damages at law, and this "with the *right* of trial by jury."

The petitioner, therefore, clearly is entitled to trial of his Jones Act claim.

POINT IV

Pendent jurisdiction; wage claim jurisdiction; diversity jurisdiction.

As respects both Compania and Garcia, the dismissal further conflicts in principle with *Hurn* v. *Oursler*, 1933, 289 U. S. 238; *Doucette* v. *Vincent*, 1st Cir. 1952, 194 F. 2d 834, 840; *Nolan* v. *General Seafoods Corp.*, 1 Cir. 1940, 112 F. 2d 515, 517, and *Lindquist* v. *Dilkes*, 3 Cir. 1942, 127 F. 2d 21. For, with jurisdiction existing of the Jones Act claim, there would be pendent jurisdiction also of the claims against them under the general maritime law, even if such jurisdiction would otherwise not exist under 28 U. S. C. Sec. 1331, and even if the claims under the Jones Act were determined against petitioner on the merits.

The dismissal of the second cause of action which claims wages to the end of the voyage conflicts also with this Court's decision in *Strathearn S. S. Co.* v. *Dillon*, 1920, 252 U. S. 348, showing that the courts of the United States are open to foreign seamen for enforcement of such claims.

Even the holding that there was no diversity jurisdiction, petitioner submits, conflicts in principle with 26 U. S. C. A. Sec. 1332, and this Court's decisions in *Strawbridge* v. *Curtiss*, 3 Cranch (7 U. S.) 267, and *Indianapolis* v. *Chase Nat. Bank*, 1941, 314 U. S. 63. This is because the "matter in controversy" between petitioner and Compania (the only defendant as to whom diversity is lacking) involves the injury of an employee and claims therefor under the Jones Act and general maritime law of the United States and for maintenance and cure and unpaid wages under the maritime law of the United States, and is distinct from the "matter in controversy" against the third-party defendants for their own negligence.

POINT V

The unfair requirement that petitioner waive in advance any claim to law jurisdiction, as a condition to allowing admiralty jurisdiction.

If this Court should hold, as respects any of defendants, that only jurisdiction in admiralty or only diversity jurisdiction is available to petitioner, this Court should then determine whether the District Court, as guardian of its seaman ward, erred in requiring petitioner, at pre-trial hearing and in advance of the Court's determination of the great questions of jurisdiction herein, to elect whether to amend his complaint and proceed upon diversity or in admiralty, and in holding that petitioner "elected at the pre-trial hearing not to amend his complaint and proceed" upon diversity or in admiralty.

CONCLUSION

The judgments of the United States Court of Appeals for the Second Circuit and of the District Court for the Southern District should be reversed; plaintiff's objections to the evidence offered by defendants in support of their defenses should be sustained and plaintiff's motion to strike out such evidence and set aside the findings of the District Court based thereon should be granted; the motions of respondents to dismiss the complaint for lack of jurisdiction of the subject matter should be denied; and the case should be remanded to the District Court for trial under the Jones Act and American Maritime Law.

Respectfully submitted,

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APPENDIX

Constitutional and Statutory Provisions Involved

CONSTITUTION OF THE UNITED STATES:

Art. III Sec. 2:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made, under their Authority; . . .—to all Cases of admiralty and maritime Jurisdiction; . . .—to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

. . . In all the . . . Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

Art. VI, cl. 2:

"This Constitution, and the laws of the United States which shall be made in Pursuance thereof and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; . . ."

The Judicial Code, 28 U. S. C. A. Secs. 1331-1335 and 1652 provide:

"1331. FEDERAL QUESTION; AMOUNT IN CONTROVERSY.

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.

"1332. DIVERSITY OF CITIZENSHIP; AMOUNT IN CONTROVERSY.

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between:

. . .

(2) Citizens of a State, and foreign states or citizens or subjects thereof;

(3) Citizens of different States and in which foreign states or citizens or subject thereof are additional parties . . .

"1333. ADMIRALTY, MARITIME AND PRIZE CASES.

The District courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

"1652. STATE LAWS AS RULES OF DECISION.

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

The Act of June 5, 1920, ch. 250, 41 Stat. 988, 1007, commonly called the Jones Act:

"CHAP. 250.—An Act To provide for the promotion and maintenance of the American merchant marine. to repeal certain emergency legislation, and provide

for the disposition, regulation, and use of property acquired thereunder, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it is necessary for the national defense and for the proper growth of its foreign and domestic commerce that the United States shall have a merchant marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States; and it is hereby declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine, and, in so far as may not be inconsistent with the express provisions of this Act, the United States Shipping Board shall, in the disposition of vessels and shipping property as hereinafter provided, in the making of rules and regulations, and in the administration of the shipping laws keep always in view this purpose and object as the primary end to be attained.

* * * * *

"SEC. 33. That section 20 of such Act of March 4, 1915, be, and is, amended to read as follows:

'SEC. 20. That any seamen who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such

personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.'

* * * * * *

"SEC. 36. That if any provision of this Act is declared unconstitutional or the application of any provision to certain circumstances be held invalid, the remainder of the Act and the application of such provisions to circumstances other than those as to which it is held invalid shall not be affected thereby."

Spanish Treaty of 1902, Art. VI and abrogated Art. XXIII:

ARTICLE VI.

The citizens or subjects of each of the two High Contracting Parties shall have free access to the Courts of the other, on conforming to the laws regulating the matter, as well for the prosecution as for the defense of their rights, in all the degrees of jurisdiction established by law. They can be represented by lawyers, and they shall enjoy, in this respect and in what concerns arrest of persons, seizure of property and domiciliary visits to their houses, manufactories, stores, warehouses, etc., the same rights and the same advantages which are or shall be granted to the citizens or subjects of the most favored Nation.

Article XXIII.

Consuls-General, Consuls, Vice-Consuls and Consular Agents shall have exclusive charge of the internal order of the merchant vessels of their Nation and shall alone take cognizance of differences which may arise, either at sea or in port, between the captains, officers and crews without exception, particularly in reference to the adjustment of wages and the execution of contracts. In case any disorder should happen on board of vessels of either party in the territorial waters of the other, neither the Federal, State or Municipal Authorities in the United States, nor the Authorities or Courts in Spain, shall on any pretext interfere, except when the said disorders are of such a nature as to cause or be likely to cause a breach of the peace or serious trouble in the port or on shore, or when in such trouble or breach of the peace, a person or persons shall be implicated not forming a part of the crew. In any other case, said Federal, State or Municipal Authorities in the United States, or Authorities or Courts in Spain, shall not interfere, but shall render forcible aid to consular officers, when they may ask it, to search for, arrest and imprison all persons composing the crew, whom they may deem it necessary to confine. Those persons shall be arrested at the sole request of the Consul addressed in writing to either the Federal, State or Municipal Authorities in the United States, or the Authorities or Courts in Spain, and supported by an official extract from the register of the ship or the list of the crew, and the prisoners shall be held during the whole time of their stay in the port at the disposal of the consular officers. Their release shall be granted at the mere request of such officers made in writing. The expenses of the arrest and detention of those persons shall be paid by the consular officers.